Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John F. Grady	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	04 C 1425	DATE	7/12/2004
CASE TITLE	Lawrence W. Falbe vs. Dell, Inc.		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Dell's motion to stay these proceedings and compel arbitration [6-1] is granted. The parties are hereby ordered to proceed to arbitration in accordance with the arbitration provision in the Terms and Conditions, and further, to notify this court within 21 days of the completion of the arbitration proceedings. **ENTER MEMORANDUM OPINION.**

(11) ☒ [For further detail see order (on reverse side of/attached to) the original minute order.]

	No notices required, advised in open court.		number of notices
	No notices required.		JUL 14 2004
✓	Notices mailed by judge's staff.		date docketed
	Notified counsel by telephone.		docketing deputy initials
	Docketing to mail notices.		7/12/2004
	Mail AO 450 form.		date mailed notice
	Copy to judge/magistrate judge.		KM
KM	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing deputy initials

Document Number

11

04-1425.041-TCM July 12, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE W. FALBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 04 C 1425
	)	
DELL INC.,	)	DOCKETED
	)	
Defendant.	)	JUL 14 2004

MEMORANDUM OPINION

Before the court is defendant's motion to stay proceedings and compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* For the reasons set forth below, the motion is granted.

BACKGROUND

The following facts are drawn from the parties' motion papers, including attached exhibits and affidavits.[1] Plaintiff Lawrence Falbe purchased a computer from defendant Dell over the telephone on or around May 25, 2003.[2] Falbe received the computer

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[1]Because a motion to compel arbitration is, in effect, an assertion that this court is deprived of subject matter jurisdiction during the pendency of the arbitration, see Jacobsen v. J.K. Pontiac GMC Truck, Inc., No. 01 C 4312, 2001 WL 1568817, at *1 n. 1 (N.D. Ill. Dec. 10, 2001), we may look beyond the pleadings and motion papers to submitted evidence in deciding the motion. See Capitol Leasing Co. v. Federal Deposit Ins. Corp., 999 F.2d 188, 191 (7th Cir. 1993).

[2]Dell products are available over the telephone, through its website or directly through a Dell sales agent.

on May 28, 2003. Enclosed with the computer was a copy of Dell's standard "Terms and Conditions of Sale."[3] The Terms and Conditions' first page of text stated:

> Please read this document carefully! It contains very important information about your rights and obligations, as well as limitations and exclusions that may apply to you. This document contains a dispute resolution clause.
>
> This Agreement contains the terms and conditions that apply to purchases by . . . customers from the Dell entity named on the invoice ("Dell") that will be provided to you ("Customer") on orders for computer systems. . . . By accepting delivery of the computer systems, other products, and or services and support described on that invoice, Customer agrees to be bound by and accepts these terms and conditions. If for any reason Customer is not satisfied with a Dell-branded hardware system, Customer may return the system under the terms and conditions of Dell's Total Satisfaction Return Policy, which is located on-line at www.dell.com/us/en/gen/misc/policy_010_policy.htm or may be found in the documentation accompanying the system.

(Def.'s Mot., Ex. A1, "Terms and Conditions of Sale," p. 3.) A copy of Dell's "Total Satisfaction Return Policy" was in fact enclosed with Falbe's computer. The Policy provided, in relevant part:

> If you are an end-user customer who bought new products directly from a Dell

[3]The Terms and Conditions were also printed on the reverse side of the invoice sent to Falbe, and were available on Dell's website or by telephone request.

> company, you may return them to Dell within 30 days of the date of invoice for a refund or credit of the product purchase price.
>
> * * *
>
> You must also prepay shipping charges and insure the shipment or accept the risk of loss or damage during shipment.

(Def.'s Mot., Ex. A2, "Total Satisfaction Return Policy," p. 7.)

The Terms and Conditions set forth two additional provisions that are relevant to this motion. First, it included a choice-of-law provision:

> Governing Law. THIS AGREEMENT AND ANY SALES THEREUNDER SHALL BE GOVERNED BY THE LAWS OF THE STATE OF TEXAS, WITHOUT REGARD TO CONFLICTS OF LAW RULES.

(Def.'s Mot., Ex. A1, p. 4, ¶ 2.)

Second, it contained an arbitration provision:

> Binding Arbitration. ANY CLAIM, DISPUTE, OR CONTROVERSY (WHETHER IN CONTRACT, TORT, OR OTHERWISE . . .) AGAINST DELL . . . arising from or relating to this Agreement, its interpretation, or the breach, termination, or validity thereof, the relationships which result from this Agreement . . . Dell's advertising, or any related purchase SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM. . . .

(Id., p. 7, ¶ 13.)

Several months after receiving the computer, in December 2003, Falbe brought this action against Dell in Illinois state

court. The complaint alleges violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS §§ 5-5/1, *et seq.* (Count I), breach of contract (Count II), unjust enrichment (Count III) and common law fraud (Count IV). Each count is based on the same allegation: Dell misrepresented to Falbe the procedure for obtaining a $200 mail-in rebate on his computer purchase.[4]

Dell demanded that Falbe voluntarily dismiss his complaint and pursue arbitration pursuant to the arbitration provision in the Terms and Conditions. When Falbe failed to respond, Dell properly removed the action to this court and filed the present motion to stay proceedings and compel arbitration.

DISCUSSION

The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("the FAA" or "the Act") allows a party to invoke a district court's authority to enforce an arbitration agreement by compelling the reluctant party to arbitrate a dispute. See 9 U.S.C. § 4. Our threshold inquiry is whether the FAA applies.[5]

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[4]Specifically, the Complaint states that "Defendant implemented a system where consumers would purchase a certain computer under the assumption they were receiving a $200 mail-in-rebate, when in fact, the rebate materials were not delivered with the computer, could only be obtained by the consumer on-line, and had a 30 day time limit of which Defendant did not notify the consumer." (See Not. of Removal, Ex. A, Compl., p. 1, ¶ 1.).

[5]Actually, our *first* question is whether we have subject matter jurisdiction over this action. The FAA itself does not grant federal question jurisdiction; rather, "there must be diversity of citizenship or some other independent basis for federal jurisdiction" to compel arbitration under the Act. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765

The Act provides:

> A written provision in any maritime transaction or *a contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). Because the transaction at issue involved interstate commerce - a Delaware corporation with its principal place of business in Texas sold a computer to an Illinois citizen - the arbitration agreement in the Terms and Conditions is governed by the FAA. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-77, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (the FAA's "involving commerce" requirement should be read broadly to extend to the limits of Congress' Commerce Clause powers).[6]

Under sections 3 and 4 of the Act, when there is a valid arbitration clause, the court must grant a request for a stay and

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(1983). This court has diversity jurisdiction because Dell and Falbe are citizens of different states and the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332.

[6]Although neither Dell nor Falbe raise the issue (both assume, without discussion, that the FAA applies), it is worth noting that the choice of law provision in the Terms and Conditions requiring the application of Texas law does not affect our conclusion that the FAA governs. See Northern Illinois Gas Co. v. Airco Indus. Gases, 676 F.2d 270, 274-75 (7th Cir. 1982) ("Notwithstanding the parties' choice of law provision in their contract calling for application of Illinois law, and irrespective of the fact that this is a diversity case, federal arbitration law governs the analysis of arbitration provisions in any contract evidencing a transaction in interstate commerce.").

direct the parties to proceed to arbitration. See 9 U.S.C. §§ 3 & 4. Before taking these steps, we must resolve two related questions: (i) whether the parties entered into a valid and enforceable agreement to arbitrate, and if so, (ii) whether the present claims fall within the scope of that agreement. See AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

A. Existence of a Valid Arbitration Agreement

Whether the parties entered into a valid arbitration agreement is a matter of contract law, see R.J. O'Brien & Assocs., Inc. v. Pipkin, 64 F.3d 257, 260 (7th Cir. 1995), and we apply ordinary state law principles of contract formation. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Our first inquiry is a choice of law question - *which* state's contract law applies? Dell summarily argues that Texas law controls under the choice of law provision in the Terms and Conditions. Falbe is silent on the issue, but by his citations, appears to be lobbying for Illinois law. In the end, as Dell points out, because Texas and Illinois have both adopted the Uniform Commercial Code, either state's law would yield the same result on the issue of whether there exists an agreement to arbitrate.[7] Nonetheless, we will briefly explain why it is that

[7]Section 2-204 of the UCC provides: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such contract." See also Tex. Bus. & Com. § 2.204; 810 ILCS § 5/2-204.

Texas law applies.

District courts exercising diversity jurisdiction must apply the choice of law rules of the forum state to determine what substantive law governs the case. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Under Illinois's choice of law rules, which follow the Restatement (Second) of Conflicts (1977), an express choice of law provision will be given effect provided: (i) it does not contravene Illinois public policy, and (ii) the state chosen bears a reasonable relationship to the parties or the transaction. See Potomac Leasing Co. v. Chuck's Pub, Inc., 156 Ill.App.3d 755, 509 N.E.2d 751, 753-55 (1st Dist. 1987). We discern no "public policy" obstacle to enforcement of the choice of law provision, and are satisfied that Texas, as the principal place of Dell's business, bears a reasonable relationship to the parties and the transaction in this case. Accordingly, the choice of law provision controls and we will apply Texas (or UCC) law to the issue of whether a valid agreement to arbitrate exists.

The relevant facts are not in dispute. Falbe received copies of both the Terms and Conditions and the Return Policy with his computer. The Terms and Conditions clearly advised Falbe that "[b]y accepting delivery of the computer, . . . Customer agrees to be bound by and accepts these terms and conditions." (Def.'s Mot., Ex. A1, p. 3.) The Terms and Conditions included a mandatory

arbitration provision. Under the Return Policy, Falbe could have returned the computer for a full refund within thirty days. (See Id., Ex. A2, p. 7.) He opted not to do so. These facts, according to Dell, give rise to an enforceable agreement to arbitrate: "terms and conditions shipped with computer equipment that are not rejected and returned by the purchaser within a specified time period are binding. . . ." (Def.'s Mot., p. 5.) Falbe contends otherwise, arguing that he did "not engage[] in any affirmative conduct in which he consented to the arbitration provision in the Terms and Conditions. He did not sign the Terms and Conditions or represent to Defendant he accepted the terms and conditions." (Pl.'s Resp., p. 3.)

Our analysis begins, and could end, with the Seventh Circuit's decision in Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997). In Hill, plaintiffs had purchased a computer from defendant by telephone. Arriving with the computer was a list of terms, including an arbitration clause, said to govern unless the computer was returned within 30 days. More than 30 days later, plaintiffs brought suit based on defendant's warranty, and defendant petitioned to compel arbitration. The Seventh Circuit held, expressly applying UCC § 2-204, that once plaintiffs kept the computer beyond the return date, they had accepted the terms of the contract. See 105 F.3d at 1150. The Court explained:

> A vendor, as master of the offer, may invite acceptance by conduct, and may

> propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.
>
> * * *
>
> Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread. . . .
>
> By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.

Id. at 1149-50 (citation omitted). Under Hill, it is plain that Falbe's conduct, *i.e.*, keeping the computer beyond 30 days, manifested his assent to the Terms and Conditions, and created a valid and enforceable agreement to arbitrate.

Falbe attempts to get out from under Hill by stating that the Court acknowledged that it might have reached a different result had plaintiffs (like Falbe) been required to pay shipping charges before returning their computer. Falbe misreads Hill. What the Court did say is that if plaintiffs had had *no* notice that *any* terms would be included with the computer, and were then dissuaded from returning it by the expense of shipping, that scenario would present an "interesting question": would a remedy be limited to those shipping charges? Id. at 1150. The Court, quickly concluded however that the question was not before it, and declined to pursue it further - given defendant's advertising of

certain terms (warranty and customer support) and the availability of all terms prior to purchasing, either by requesting a copy or visiting the vendor's website, plaintiffs had sufficient notice that "the carton would include *some* important terms, and [plaintiffs] did not seek to discover these in advance." Id.

So, contrary to Falbe's reading, the Hill Court assumed that plaintiffs *would have* incurred shipping costs. And to the extent Falbe intended to bring his case within the hypothetical actually posed by the Court, he gets no further. Like the defendant in Hill, Dell advertises its service and customer support and its Terms and Conditions are available by contacting Dell directly or by accessing its website. Therefore, like plaintiffs in Hill, Falbe was not without notice that *some* terms would be included with his computer.[8]

Falbe proffers a second argument which need not detain us long. He contends that the Terms and Conditions, and the arbitration provision contained therein, is an unenforceable contract of adhesion because "it was drafted entirely by [Dell]" and because Dell "had superior bargaining power over defendant." (Pl's Resp., p. 4.) Under Texas law, "an adhesion contract [is] a contract in which one party has absolutely no bargaining power or ability to change the contract terms." In re. Media Arts Group,

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[8]In fact, the Complaint states that Falbe did examine Dell's website prior to placing his telephone order. (See Not. of Removal, Ex. A, Compl., p. 3, ¶¶ 9-10.)

Inc., 116 S.W.3d 900, 911 (Tex. Ct. App. 2003). Under this definition, the contract between Dell and Falbe does appear to be one of adhesion; there was no bargaining over the terms. By Falbe's logic then, once we determine that the contract is adhesive, it follows, *ipso jure*, that it is unenforceable. This is not the law. Apart from (or perhaps because of) the fact that accepting Falbe's argument would render almost all consumer contracts unenforceable, Texas law is clear that disparate bargaining power is alone insufficient to render an arbitration agreement unenforceable. See Holeman v. National Business Institute, Inc., 94 S.W.3d 91, 100 (Tex. Ct. App. 2002). Instead, the party seeking to invalidate the agreement must show that the agreement is either procedurally or substantively unconscionable. See In re H.E. Butt Grocery Co., 17 S.W.3d 360, 371-72 (Tex. Ct. App. 2000) (noting that "[a]dhesion contracts are not automatically unconscionable or void" and upholding arbitration agreement where "[t]here is no proof that [defendant] hid or misrepresented the terms of the arbitration agreement or that it made any misrepresentations regarding arbitration"); Media Arts Group, 116 S.W.3d at 911 ("[A]n adhesion contract is not automatically unconscionable. . . . [T]he party opposing arbitration must also present some other evidence of unconscionability."); see also Metro East Center for Cond. and Health v. Quest Comm. Int'l, Inc., 294 F.3d 924, 926 (7th Cir. 2002) ("[W]e have held that form contracts,

offered on a take-it-or-leave-it basis, are agreements for purposes of the Arbitration Act.") (citing Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997)). Absent any allegations of unconscionability beyond mere bargaining inequality, and there are none, Falbe's argument must fail.[9] In sum, we conclude that Falbe has entered into a valid and enforceable agreement to arbitrate.

B. Scope of the Arbitration Agreement

Turning to our second and final inquiry, Falbe argues that even if the arbitration provision is enforceable, the provision does not cover the claims presented in his Complaint. The arbitration provision in the Terms and Conditions compels arbitration of: "any claim, dispute, or controversy . . . arising from or relating to this Agreement . . . the relationships which result from this Agreement . . . Dell's advertising, or any related purchase." (Def.'s Mot., Ex. A1, p. 4, ¶ 13.) Each of Falbe's claims, whether sounding in contract or fraud, arises from the allegation that Dell misrepresented the procedure for obtaining a $200 mail-in rebate on his computer purchase. Falbe submits that

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[9]Parenthetically, we note that Falbe does not cite a single case - from Texas, Illinois or elsewhere - invalidating an arbitration clause as an unenforceable contract of adhesion. The lone case Falbe does cite, Parker v. Am. Family Ins. Co., 315 Ill.App.3d 431, 734 N.E.2d 83 (3d Dist. 2000), involves "escape hatch" clauses, under which either party (almost always the defendant) may opt out of a mandatory arbitration provision if the arbitration award exceeds a certain amount. The Parker court invalidated an "escape hatch" clause as contrary to public policy but upheld the remainder of the arbitration provision as valid and enforceable. Id. at 86. Of course, the arbitration provision in Dell's Terms and Conditions does not contain an "escape hatch" clause, so Parker is inapplicable.

because the word "rebate" does not appear in the Terms and Conditions, and alternatively, because the rebate "had nothing to do with the actual product sold," his claims are not within the scope of the arbitration provision. (Pl.'s Resp., p. 6.)

We begin with the oft-cited rule that "any doubts as to whether [a plaintiff's] claims fall within the scope of the agreement must be resolved in favor of arbitration." Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 899 (Tex. 1995) (citing Moses H. Cone Mem'l Hosp., 460 U.S. at 24-25). Moreover, "[t]he policy in favor of enforcing arbitration agreements is so compelling that a court should not deny arbitration '*unless it can be said with positive assurance* that an arbitration clause is *not* susceptible of an interpretation which would cover the dispute at issue.'" Marshall, 909 S.W.2d at 899 (citations omitted). Finally, when, as here, the arbitration provision expressly includes "[a]ll disputes, claims or controversies arising from or relating to the contract," the party opposing arbitration is "required to present the most forceful evidence of purpose to exclude his claim from arbitration." In re Conseco Fin. Serv. Corp., 19 S.W.3d 562, 570 (Tex. Ct. App. 2000); see also AutoNation USA Corp. v. LeRoy, 105 S.W.3d 190, 196 (Tex. Ct. App. 2003) (Arbitration language "requiring arbitration of any controversy or claim 'arising out of or relating to' the Purchase Agreement or the breach thereof, is recognized as broad language favoring arbitration."); Sweet Dreams

Unlimited, Inc. v. Dial-A-Mattress Int'l., Ltd., 1 F.3d 639, 642 (7th Cir. 1993) (arbitration provisions stating that they include all disputes "arising out of" an agreement cover "all disputes having their origin or genesis in the contract, whether or not they implicate interpretation or performance of the contract per se").[10]

Against these standards, Falbe's argument borders on the frivolous. His claims, all of which involve Dell's rebate offer, clearly "arise from" and "relate to" his purchase contract with Dell. But for that contract, Falbe would have had no relationship whatsoever with Dell, and thus no standing to bring a claim challenging the rebate offer. Put simply, no computer purchase, no rebate offer. Because all of Falbe's claims fall squarely within the arbitration provision in the Terms and Conditions, they are subject to arbitration.

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[10]The scope, as distinct from the existence, of an agreement to arbitrate is governed by *both* federal and state law. The Supreme Court has stated that the FAA has federalized the interpretation of the scope of arbitration clauses in one important respect. As a matter of federal law, the existence of an arbitration clause creates a strong presumption of arbitrability and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp., 460 U.S. at 24-25. The Act does not otherwise displace state contract law, so long as that state law does not treat arbitration agreements differently than other contracts. See Doctor's Assocs., Inc., v. Casarotto, 517 U.S. 681, 687-88, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added)."). As to which state law applies, under the same analysis set out above, we apply the law of Texas.

CONCLUSION

For the foregoing reasons, Dell's motion to stay these proceedings and compel arbitration is granted. The parties are hereby ordered to proceed to arbitration in accordance with the arbitration provision in the Terms and Conditions, and further, to notify this court within 21 days of the completion of the arbitration proceedings.

DATE: July 12, 2004

ENTER: _____

John F. Grady, United States District Judge